

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**U.S. NEUROSURGICAL, INC.,
RESPONDENT
vs.**

**MIDWEST DIVISION – RMC, LLC,
APPELLANT**

DOCKET NUMBER WD70122

DATE: MARCH 2, 2010

Appeal from:

Jackson County Circuit Court
The Honorable Jay A. Daugherty, Judge

Appellate Judges:

Before Court En Banc: Thomas H. Newton, Chief Judge, Joseph M. Ellis, Judge, Victor C. Howard, Judge, Lisa White Hardwick, Judge, James E. Welsh, Judge, Alok Ahuja, Judge, Mark D. Pfeiffer, Judge, Karen King Mitchell, Judge and William E. Turnage, Senior Judge

Attorneys:

Kenneth L. Marshall, for Appellant

Richard E. McLeod, for Respondent

Ellis, Hardwick, Pfeiffer and Mitchell, JJ., concur in the opinion of Howard, J., for the court.
Newton, C.J. dissents in separate dissenting opinion.
Welsh and Ahuja, JJ. and Turnage, Sr. J., concur in dissenting opinion.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

U.S. NEUROSURGICAL, INC., RESPONDENT

v.

MIDWEST DIVISION – RMC, LLC, APPELLANT

WD70122

Jackson County, Missouri

Before Court En Banc: Thomas H. Newton, Chief Judge, Joseph M. Ellis, Judge, Victor C. Howard, Judge, Lisa White Hardwick, Judge, James E. Welsh, Judge, Alok Ahuja, Judge, Mark D. Pfeiffer, Judge, Karen King Mitchell, Judge and William E. Turnage, Senior Judge.

Midwest Division – RMC, LLC (“RMC”) and U.S. Neurosurgical, Inc. (“USN”) entered into a contract in which USN agreed to maintain a Gamma Knife neuro radiosurgery unit for the use of RMC’s patients. RMC was given the right to bill and collect for Gamma Knife procedures and was required to remit a portion of the payments received for the procedures to USN. USN later began complaining to RMC that USN had not been receiving a minimum payment of \$10,000 per procedure, which it believed it was entitled to under the terms of the contract. USN thereafter filed a breach of contract action against RMC. The jury found that the contract contained a minimum payment provision guaranteeing USN \$10,000 per procedure and awarded USN approximately \$1.9 million. RMC appeals.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

(1) Where an average person could find the contractual language regarding USN’s compensation reasonably susceptible of more than one meaning, the language was ambiguous and, therefore, the issue of whether the contract guaranteed USN a minimum payment of \$10,000 per procedure was properly submitted to the jury.

(2) Where the CEO of USN indicated that USN expressly agreed to accept less than the minimum payment of \$10,000 for Medicare outpatient procedures, RMC was entitled to a directed verdict on its affirmative defense of consent. Therefore, the trial court’s judgment as to Medicare outpatient procedures is reversed and remanded for a recalculation of USN’s damages.

(3) Where the evidence did not unambiguously prove that USN consented to below minimum payments for non-Medicare procedures, RMC was not entitled to a directed verdict as to those procedures and the issue was properly submitted to the jury.

Opinion by: Victor C. Howard, Judge

Date: March 2, 2010

Dissent Opinion by Chief Judge Thomas H. Newton:

The author would hold that the trial court erred in failing to grant a directed verdict because USN failed to make a submissible case. USN's sole theory of damages was premised on breach of a "minimum payment" requirement. Because the contract unambiguously expressed no "minimum payment" guarantee, this issue should not have been submitted to the jury.

The question of contract terms is only properly submitted to the jury where the contract itself is ambiguous. Ambiguity requires the plain meaning of the terms to have more than one reasonable interpretation. We are prohibited from creating ambiguities by distorting contractual language that may otherwise be reasonably interpreted.

The contract between USN and RMC may reasonably be interpreted through its express terms to contain two reconcilable promises. Section 4.01 promises compensation: it provides that USN shall be given eighty percent of the actual cash collected from patients and their insurers. Section 2.11 promises concurrence: it provides that the parties will agree prior to the procedure being performed where the expected reimbursement is less than the stipulated amount. Neither provision sets forth a minimum payment guarantee.

Implying a "minimum payment" guarantee into the agreement runs afoul of our cardinal principles of contract interpretation. It contradicts the agreement's express provisions, requires ignoring the plain language of section 2.11, renders the language of other sections useless, and negates the very meaning of the language chosen by the parties to express their intent.

Consequently, I would grant RMC's first point and reverse the judgment.

<p>This summary is <i>UNOFFICIAL</i> and should not be quoted or cited.</p>
--